IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01/11/2002

CORAM

THE HON'BLE MR.JUSTICE MALAI.SUBRAMANIAN

CRIMINAL APPEAL NO.248 OF 1996
and
CA.Nos 249 and 255 of 1996

1. Balagovindarajulu .. Appellant/A1 in CA248/1996

1. K. Bhuvanendran
2. R.M. Palaniswami ..Appellants/ A3 & A6 in CA 249/1996

1. C. Thangapandi
2. R. Rajendran
3. S. Raju
..Appellants/ A2,A4 & A5 in CA 255/1996

-Vs-

State rep. By the Inspector of Police
Vigilance and Anti Corruption
Coimbatore (crime No.6/AC/86/CB) .....Respondent

Appeal filed under Section 374(2) of Cr.P.C. against the conviction and sentence passed by the learned Additional Special Judge/I Additional Sessions Judge cum Chief Judicial Magistrate, Coimbatore in Special Calendar Case No.5/89 dated 14.3.1996.

!For appellants 2,4 and 5 .. Mr.R. Shanmugasundaran
in C.A.No.255/86 Senior Advocate for
Mr.S.N. Thangarai and
M. Mugundan

For 1st appellant in .. Mr.K. Asokan.Sr. Counsel
C.A.No.248/96 for Mr.Sundar Mohan

For appellants 3 and 6 in
C.A.No.255/96 .. Mr.A. Balaguru for
Mr.P.S. Venkatasubramanian

^For respondents .. Mr.E. Raja
Addl. Public Prosecutor
:JUDGMENT

The accused 1 to 6 in Special Calendar Case No.5/89 on the file of Additional Special Judge/I Additional Sessions Judge cum Chief Judicial Magistrate, Coimbatore were convicted and sentenced to undergo R.I for 3 years and to pay a fine of Rs.3,000/- each, in default to suffer R.I for 6 months for offence punishable under Sec.477-A IPC; to undergo R.I for 3 years and to pay a fine of Rs.3,000/- each, in default to suffer R.I for 6 months for offence punishable under Sec.420 IPC and to undergo R.I for 3 years and to pay a fine of Rs.3,250/-, in default to suffer R.I for 6 months for offence punishable with 5(2) read with 5(1)(d) of Prevention of Corruption Act, 1947. Though they were convicted for offences punishable under Sec.120-B read with Sec.47 7-A, 420 and 5(2)read with 5(1)(d) of Prevention of Corruption Act, no separate sentences were imposed for that offence. The sentences were ordered to run concurrently except the default sentence for non payment of fine which has to run consecutively. The 1st accused challenging the above conviction and the sentence has filed C.A.No.248/96; 2nd, 4th and 5th accused have filed C.A.No.255/96 and 3rd and 6th accused have filed 249/96. Since all the three appeals arise out of a single judgment, the following common judgment is pronounced on appeal. For convenience, the appellants will be referred to as accused 1 to 6 in the same order in which they were arrayed before the trial court. They were convicted on an allegation that A.1 to A.6 being public servants entered into a criminal conspiracy between May 1983 and April 1985 to cheat the TWAD Board by claiming amounts more than actually due for the execution of the work relating to the supply of Siruvani water to Bharathiar University and Maruthamalai Temple Adivaram in Coimbatore area by recording false measurement in the measurement book relating to those works and by abusing their position as public servants have obtained pecuniary advantage to the tune of Rs.55,846.82 for themselves and for the approvers T. Guruswami – P.W.14, P. Sivakaminathan – P.W.15. The brief facts required to dispose of the appeal are as follows:

2. The 1st accused was the Executive Engineer, TWAD Board, Siruvani Special Division II, Coimbatore from 22.8.83 to 30.4.85; 2nd accused was then the Assistant Executive Engineer in Special Division III between 2.1.80 and 31.7.83 and in Special Division II from 31.7.83 to 21.2.85; 3rd accused was the Assistant Executive Engineer in Special Division – II from 1.10.1983 to 30.4.1985; 4th accused was the Junior Engineer in Special Division III from 1.2.82 to 31.7.83 and in Special Division II from 31.7.83 to 6.8.85; 5th accused was the Assistant Engineer in Division No.II from 6.10.82 to 5.6.84 and 6th accused was the Assistant Engineer in the same Division from 8.9.83 to 30.4.85. The TWAD Board resolved to approve Coimbatore Water Supply Augment Scheme with Siruvani as source, for extending water supply to Bharathiar University and Maruthamalai Temple Adivaram. Technical sanction was also accorded by Chief Engineer, Madras. The TWAD Board also granted approval for the same.

3. The above scheme was divided into two: 1) Laying, joining and testing of 250 mm class 10 AC pipes from common pump house to sump at Bharathiar University; 2) Laying, joining and testing of 100 mm dia mtr class 15 AC pipes from sump at Bharathiar University to Maruthamalai Temple Adivaram. Tenders were invited. The tender of P.W.14 Guruswami was approved and Ex.P.15 Work Order was awarded to him for the first work. The tender of

P.W.15 Sivakaminathan was approved and Ex.P.8 work order was awarded to him for the second work. Besides these work orders, certain portions of both the works were covered under various written understandings Exs.P.23 to Ex.P.37.

4. The 1st accused, formerly Executive Engineer; the 2nd accused, Assistant Executive Engineer and the 4th accused,Junior Engineer along with P.W.14 Guruswami entered into a criminal conspiracy to cheat the TWAD Board by claiming amounts more than actually payable and the 2 nd and 4th accused prepared fictitious trial pit particulars and recorded false measurements and check measurements in the measurement books. The 1st accused passed the bills without any super check. The work was also conveniently split up into several parts so as to bring the value of each work within the financial competency of the sanctioning authority. Insofar as the work relating to Bharathiar University, the 4th accused made measurements and the 2nd accused check measured the same.

4. A.1, A.2, A.3, A.5 and A.6 entered into a criminal conspiracy with P.W.15 to cheat the TWAD Board by claiming more amounts actually payable for the execution of the work viz., supply of Siruvani Water to Maruthamalai Temple by recording false measurements and check measurements in the measurement book. A.5 and A.6 recorded the measurements in respect of Maruthamalai Temple. A.2 and A.3 check measured the same and A.1 passed the bill without any super check. They have also violated by taking some works under written understandings even for the reach covered within the main agreement. The written understanding Exs.P.25 and P.26 were granted in favour of P.W.14 without terminating the main agreement.

5. They have also committed malpractice in the classification of soil to be excavated. Air pit walls were included for payment of bills though they were not originally covered under the agreement. During measurement, the 3rd accused has wrongly noted the thickness of the slabs as 18 cms while the same is actually 15 cms.

6. A preliminary enquiry was taken up by the Department of Vigilance and Anti-Corruption and the Deputy Superintendent of Police, who conducted the secret enquiry sent his report dated 17.11.84 to the Director of Vigilance and Anti Corruption, Chennai. Thereafter, P.W.37 – Inspector of Police, Vigilance and Anti-Corruption, Coimbatore was asked by the Director of Vigilance and Anti Corruption to make a detailed enquiry against the 2nd accused. P.W.37 sought the assistance of a retired Executive Engineer by name Ayyavu, who was originally working in the Department of Vigilance and Anti-Corruption. P.W.37 received a report from the said Ayyavu on 4.11.85. After verifying the report, P.W.37 submitted a detailed report to the Director of Vigilance and Anti-Corruption on 26.1.86. On the direction of the Director, Vigilance, a case was registered against A.1 to A.6, P.W.14 and P.W.15 for the offences punishable under Secs.120-B, 167, 420,477-A and 109 IPC and Sec.5 (1)(d) read with 5(2) of Prevention of Corruption Act, 1947. P.W.37 made a request for the technical assistance of an Executive Engineer and accordingly, P.W.28 Mr. Purushothaman, who was then working as Executive Engineer, P.W.D (Buildings) at Coimbatore was appointed under Ex.P.62, Proceedings of the Chief Engineer, P.W.D(General), Madras-5.

7. P.W.28 was instructed to find out the extent of substandardness in the execution of the above work and the boosted up false measurements recorded by the Officials by carrying out super check of the suspected work. Accordingly, P.W.28 received the documents from P.W.37. Since the pipe lines were laid underneath the earth, the services of P.W.29 – Assistant Engineer, TWAD Board, Coimbatore was also utilised for digging model pits in accordance with the sketches prepared for the pipe lines. P.W.29 dug 60 pits to enable P.W.28 to ascertain the classification of the soil and the measurements of the sand bedding. P.W.28 along with P.W.27 in the presence of accused 2,3,4,5 and 6 commenced his work on 9.4.88. He then super-checked the measurements relating to sand bedding and also noted the classification of the soil in Ex.P.23 report along with Ex.P.64 measurement book. When the actual measurements taken by him were compared with the estimation of the work allotted insofar as Bharathiar University agreement No.11 is concerned, the loss to the Government was estimated as Rs.33,745.21 and with regard to Maruthamalai Temple Agreement No.4, the loss was Rs.20,988.70. P.W.28 gave his report to P.W.37 on 18.10.88. P.W.37 collected certain other documents from different Departments.

8. On 24.11.88, P.W.37 arrested P.W.15 at 10.00 a.m and questioned him. Exs.44 Savings Accounts Pass Book and Ex.P.45 pocket note book were seized. Then P.W.15 was released on bail. A requisition was given to the Chief Judicial Magistrate, Coimbatore for recording a statement under Sec.164 Cr.P.C from P.W.15. The statement of P.W.15 was recorded and he was tendered pardon. On 10.2.89 at about 10.00 a.m, P.W.14 was arrested and questioned. A request was made to record a statement under Sec.164 Cr.P.C from P.W.14. The said statement was also recorded and he was also tendered pardon. After completing investigation P.W.37 submitted his final report to Director of Vigilance and Anti-Corruption along with all the records. The Director forwarded the same to the Managing Director, TWAD Board for according sanction to prosecute the accused. Sanction was accorded under Ex.P.82. Thereafter, P.W.37 filed a final report against all the accused before the Court.

9. When the trial Court questioned the accused under Sec.313 Cr.P.C, they denied their complicity in the commission of the offence and no witnesses were examined on their side.

10. There is no dispute that A.1 to A.6 were concerned with the execution of the work relating to supply of Siruvani water to Bharathiar University and Maruthamalai Temple Adivaram in Coimbatore area. There is also no dispute that during the relevant period, the 1st accused was the Executive Engineer; 2nd and 3rd accused were the Assistant Executive Engineers, 5th and 6th accused were the Assistant Engineers and the 6th accused was a Junior Engineer in TWAD Board, Coimbatore. Two schemes were drafted; one for Bharathiar University and the other for Maruthamalai Temple Adivaram. P.W.2, while working as Drafts Man in Siruvani Augmentation of Water Supply Scheme during the period 1.2.80 to 31.7.83, on the instructions of the then Executive Engineer Mr.N. Natarajan, prepared tender schedule Ex.P.13 to take water from Siruvani Pump House to Bharathiar University. The comparative Statement is Ex.P.14. Tender Notification is Ex.P.15. Ex.P.16 is the acceptance letter of P.W.14. This work was approved by S. Natarajan, the then Executive Engineer.

With regard to the above aspect, there is no dispute by any of the appellants.

11. The scheme relating to taking water from Bharathiar University to Maruthamalai Adivaram was prepared by P.W.1, a senior Drafts Man of TWAD Board. The same was prepared on the instructions of the then Executive Engineer S. Natarajan. The detailed estimate is Ex.P.1 and the same was prepared by the Executive Engineer Varadamani, Assistant Executive Engineer, Chennai. Ex.P.3 is the concerned register. According to P.W.1, P.W.15 the lowest bidder was given the work allotment. P.W.1 would say that A.1 has also approved the tender. Ex.P.12 Entry in the register was also countersigned by the 3rd accused. Ex.P.12 was prepared by the 6th accused. There is no dispute with regard to the above aspects also. The only contention of the learned Senior Counsel Mr.R. Shanmugasundaram, who appeared for 2nd,4th and 5th accused is that out of Rs.6,000/-, only Rs.4,500/- was given to the Contractor and the remaining Rs.1,500/- has not been given.

12. Insofar as A.3 and A.6 are concerned, the allegation against them is that as per the agreement, the slabs for covering the pits should have 18 cms thickness, whereas as per Ex.P.10 measurement books, it was only 15 cms.

13. The learned senior counsel Mr.K. Asokan appearing for the 1st accused contends that the only allegation against the 1st accused is that without making super check he signed the bills. He drew my attention to the evidence of P.W.1, who would say that the work was allotted to P.W.15 only legally. Of course, there is no dispute at all insofar as the allotment is concerned. The learned senior counsel points out that P.W.4, Accounts Officer during the course of his cross examination admits that super check has to be done by the Executive Engineer only when the estimate of work exceeds Rs.1 lakh. Admittedly, in this case the work allotment for P.W.14 was for Rs.90,135.30, while the work estimate for P.W.15 is Rs.84,993/-. Since both the estimates run below Rs.1 lakh, the learned senior counsel contends on the basis of the admitted evidence of P.W.4 that the 1st accused cannot be fastened with any liability for not conducting super check. This contention seems to be well founded. P.W.7, Junior Engineer also admits that there was no audit objection and no remarks of inspection also by the superior authorities insofar as the pipe line work are concerned. The learned senior counsel brings to the attention of this Court regarding the absence of sanction to prosecute the 1st accused. Ex.P.82 the sanction order filed in this case reads this:
"Whereas it is now found that the sanction proceedings in respect of Thiru.A. Balagovindarajulu is void ab initio for want of competence of the Managing Director, TWAD Board, to accord sanction in respect of him".

14. No other sanction order was produced to prove the according of sanction to prosecute the 1st accused. Of course Ex.P.81, Order of TWAD Board dated 13.7.89 reads that sanction was accorded for prosecution of the 1st accused also. Subsequently, the sanctioning authority came to know his incompetency and therefore, the second sanction order Ex.P.82 dated 8.7.92 was made. Therefore, virtually, there was no sanction to prosecute the 1st accused at all. The 1st accused, being an Officer of the Government, can be removed only by the State Government. No sanction order was obtained from the

State Government to prosecute him. On these contentions, the learned senior counsel Mr.K. Asokan seeks acquittal of the 1st accused.

15. Insofar as 1st accused is concerned, besides non filing of any sanction order, admittedly he was not responsible for super check. The only allegation against him is that he failed to do super check of the work before passing the bills. When he is not expected to do the super check legally, he cannot be fastened with any liability. The final bill has not yet been sanctioned to either of the Directors viz., P.W.14 and P.W.15. The Executive Engineer can inspect the work given at the time of execution of the first final bill and in case any malpractice was found during the execution of the work, he is empowered to refuse sanction of bills for the work which was not done. That stage admittedly has not reached. More over , the absence of sanction to prosecute the 1st accused was challenged even before the trial court, P.W.36, the Managing Director of TWAD Board in his cross examination has admitted that he did not issue the sanction order to prosecute the 1st accused. Moreover, P.W.35, Chairman and Managing Director of TWAD Board who was in Office prior to P,.W.36, though would say he is empowered to accord sanction to prosecute the 1st accused, the contents of Ex.P.82 nullifies his evidence. Since Ex.P.82 categorically speaks that sanction proceedings in respect of the 1st accused is void ab initio for want of competence of the Managing Director, TWAD Board to accord sanction in respect of him and since the question of sanction was raised even at the trial stage itself , the absence of sanction order in this case has necessarily caused prejudice to the 1st accused. Therefore, I am of the view that the 1st accused both on the ground of absence of sanction and on the ground that he is not legally bound to super check the above works, is entitled to an acquittal.

16. Before entering into the factual matrix with regard to the allegation against A.2 to A.6, certain legal objections raised by the learned senior counsel Mr.R. Shanmugasundaram, deserve consideration.

17. The first and foremost attack was on the validity of the sanction order Exs.P.81 and P.82. The learned senior counsel submits that in the absence of sanction under Sec.197 Cr.P.C, conviction of the appellants for offences punishable under Secs.477-A, 420 and 120-B IPC is bad. According to him, sanction accorded under Sec.19 of the Prevention of Corruption Act 1988 also is bad, since the accused were charged for the offence punishable under Sec.5(2) read with 5(1) (d) of Prevention of Corruption Act,1947. He made distinction between sanction under Sec.197 and sanction under Sec.6 of the Prevention of Corruption Act, 1947 and according to him a single sanction order will not serve the purpose.

18. Ex.P.81 dated 13.7.89 was later modified by Ex.P.82 dated 8.7.9
2. Though in Ex.P.81, sanction was accorded to prosecute all the accused by the then Managing Director, it was later found out that the sanction proceedings in respect of the 1st accused is void ab initio for want of competence of the Managing Director, TWAD Board to accord sanction in respect of him. Another sanction proceedings was issued. Though the learned senior counsel contends that, according sanction under the Prevention of Corruption

Act alone is insufficient to prosecute the accused for offences punishable under Indian Penal Code, both the sanction orders only reveal that the sanctioning authority was conscious of the prosecution against the accused for offences punishable under Secs.120-B read with 477-A and 420 IPC and under Secs.477A and 420 IPC also.

19. Sec.197 Cr.P.C is a general provision, not confined to Indian Penal Code alone. Any Public Servant accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty, can be prosecuted only after a sanction to prosecute was accorded by either the Central Government or State Government as the case may be. Moreover, sanction is required to prosecute a public servant who is not removable from office except by the Government or with the sanction of the Government. The accused 2 to 5 can be removed from service by the Managing Director cum Chairman of the TWAD Board. This part of evidence of P.W.35 and P.W.36 is not challenged. None of the accused except the 1st accused took a plea that he was not removable by any competent authority except the Government. Since admittedly, A.2 to A.5 are not public servants removable from office either by the Government or with the sanction of the Government, Sec.197 Cr.P.C is not at all helpful to them. This position is strengthened by a ruling of the Apex Court reported in 1998 SCC (Crl) 1265 (Mohd. Hadi Raja vs State of Bihar). The relevant passages are hereunder:
"It is to be noted that though through the contrivance or mechanism of corporate structure, some of the public undertakings are performing the functions which are intended to be performed by the State, ex facie, such instrumentality or agency being a juridical person has an independent status and the action taken by them, however important the same may be in the interest of the State cannot be held to be an action taken by or on behalf of the Government as such within the meaning of Section 197 Cr.P.C"
.....
"The importance of the public undertaking should not be minimised. The Government's concern for the smooth functioning of such instrumentality or agency can be well appreciated but on the plain language of Section 197 of the Code of Criminal Procedure, the protection by way of sanction is not available to the officers of the public undertaking because being a juridical person and a distinct legal entity, such instrumentality stands on a different footing than the government departments.

It is also to be indicated here that in 1973, the concept of instrumentality or agency of State was quite distinct. The interest of the State in such instrumentality or agency was well known. Even then, the legislature in its wisdom did not think it necessary to expressly include the officers of such instrumentality or the government company for affording protection by way of sanction under Sec.197 Cr.P.C.

It will be appropriate to notice that whenever there was a felt need to include other functionaries within the definition of "public servant", they have been declared to be "public servants"under several special and local acts. If the legislature had intended to include officers of an instrumentality or agency for bringing such officers under the protective umbrella of Section 197 Cr.P.C, it would have done so expressly.

Therefore, it will not be just and proper to bring such persons within the ambit of Section 197 by liberally construing the provisions of Section 197. Such exercise of liberal construction will not be confined to the permissible limit of interpretation of a statute by a Court of law but will amount to legislation by court.

Therefore, in our considered opinion, the protection by way of sanction under Section 197 of the Code of Criminal Procedure is not applicable to the officers of government companies or the public undertakings even when such public undertakings are "State" within the meaning of Article 12 of the Constitution on account of deep and pervasive control of the Government".

20. Insofar as the other contention is concerned, it has to be seen whether sanction accorded under the new Act is bad inasmuch as the prosecution was launched under the repealed Act. In this case, the First Information was launched on 11.6.86 and after investigation final report was filed according to P.W.37 only on 6.10.89. The new Act came into force on 9.9.88. Though the final report was filed after coming into force of the new Act by no stretch of imagination, the accused could be prosecuted for the offence under the new Act. They can be prosecuted for the offence which was in the statute at the time of commission of the offence and they cannot be prosecuted for a new offence or a different offence by virtue of the repealing act. But at the same time, Sec.30 of the New Act saves anything done or any action taken or purported to have been taken or done under or in pursuance of the Act so repealed shall insofar as it is not inconsistent with the provision of this Act, be deemed to have been done or taken under or in pursuance of the corresponding provision of the Act. This provision only means that any action taken under the old Act shall be deemed to have been taken under the corresponding provision of this Act. The Supreme Court considered the applicability of Sec.19(3) of 1988 Act to the cases initiated under the repealed Act. In the case of Central Bureau of Investigation vs V.K. Sehgal and another reported in 1999 SCC (Crl) 1494, the Apex Court has held as follows:
"Moreover, the present prosecution was launched under the 1947 Act, but by the time the case reached final stage in the trial court, the 1 947 Act was repealed by the Prevention of Corruption Act, 1988 (hereinafter referred to as "the 1988 Act") which came into force on 9.9.19 88. The prosecution and the trial thereafter continued by virtue of sub-section (2) of Section 30 of the 1988 Act. In view of Section 6 of the General Clauses Act, 1897, "unless a different intention appears" in the 1988 Act the repeal of the 1947 Act will not affect any penal liability incurred or any legal proceedings or remedy in respect of any right acquired under the 1947 Act. However, if a different intention can be discerned from the 1988 Act, such intention will have an overriding effect. It is said in sub-section (2) of Section 30 of the 1988 Act that any action taken under or in pursuance of the repealed Act will be deemed to have been taken under the corresponding provisions of the new Act. Unlike the 1947 Act, there is in Section 27 of the 1988 Act a special provision regarding appeal and revision by virtue whereof the powers of appeal and revision of the High Court conferred by the Code of Criminal Procedure shall be "subject to the provision of" the 1988 Act. Section 19(3) (a) of the 1988 has made a further inroad into the powers of the appellate court over and

above the trammel contained in Section 465 of the Code. Thus the legal position to be followed, while dealing with the appeal filed against the conviction and sentence of any offence mentioned in 1947 Act, is that no such conviction and sentence shall be altered or reversed merely on the ground of absence of sanction, much less on the ground of want of competency of the authority who granted the sanction. So from any point of view the High Court committed an error in setting aside the conviction and sentence passed on the accused, on the ground of want of a valid sanction to prosecute".

Therefore, it is idle to contend that Sec.19 of Prevention of Corruption Act cannot be invoked by the Prosecuting Agency in this Case. Therefore, sanction accorded under Sec.19 of the Act does not suffer from any infirmity.

21. The learned senior counsel attacked the very sanction order itself on the ground of non application of mind. He relies on the ruling of the Apex Court reported in A.I.R.1979 SC 677 (Mohd. Iqbal Ahmed vs State of Andhra Pradesh), wherein the Apex Court has been pleased to hold that the grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government servants against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned.

22. As against this ruling, the learned Additional Public Prosecutor relies on another ruling of the Apex Court reported in 1998 SCC Crl 644(State of Orissa vs Mrutunjaya Panda),wherein the Apex Court has been pleased to hold that there shall be a finding as to whether the irregularity in the sanction has occasioned a failure of justice. As held by the Supreme Court in 1999 SCC (Crl)1494(Central Bureau of Investigation vs V.K.Sehgaland another),no finding, sentence or order passed by a Special Judge shall be reversed or altered by a Court in Appeal,confirmation or revision on the ground of absence of or any error,omission or irregularity in the sanction unless a failure of justice has in fact been occasioned in this case. I could not see any reason to hold that the sanction order was irregular. The sanctioning authority considered the report of the Director, Vigilance and AntiCorruption and all the other connected records and that is very much explicit in the preamble itself. Therefore,I see no reason to uphold the contention of the learned senior counsel. Moreover, Sec.6(1) is more or less verbatim reproduction of Sec.19(1) except for the sections of the offences and therefore, no prejudice could be said to have been caused merely because sanction was not accorded under Sec.19 of the Act. The offence under Sec.5(2) read with 5(1)(d) has been split up into 3 sub clauses under Sec.13(1)(d) and the term by otherwise occurring in Sec.5(1)(d) is absent in the new provision. If instead of charging the accused under Sec.5(1)(d), they were prosecuted under Sec.13(1)(d), then the prosecution will stand vitiated because of the vast difference between the ingredients of both the provisions. But sanction accorded under Sec.19 of the Act by virtue of the above ruling of the Apex Court cannot be questioned at this stage in the appeal. Moreover, by the time investigation was completed since the new Act came into force, the sanctioning authority on the date of sanction cannot accord sanction under the old Act which was not in existence at all. Insofar as the penal provision is concerned, it is the date of the offence that is crucial; like wise insofar as

the sanction is concerned, the date of sanction is crucial. Therefore, the power cannot be traced under the old Act. On this ground also, I am unable to uphold the contention of the learned senior counsel that sanction is bad.

23. The next attack by the learned Senior counsel is misjoinder of charges. According to him, A.1, A.2 and A.4 alone are concerned in the scheme relating to water supply to Bharathiar University, whereas under the second scheme relating to water supply to Maruthamalai Temple Adivaram, A.1, A.2,A.3, A.5 and A.6 were responsible and therefore, there is misjoinder of charges. According to him the misjoinder of persons cannot be cured under Sec.465 also. In support of his contention, he relies on a ruling of the Apex Court reported in 1992 SCC Crl 572 (K.T.M.S. Mohd. And Another vs Union of India),wherein the Apex Court held that on the allegation of the complaint, the third appellant could not be jointly indicted for the above conspiracy charges since the first and the second appellants are stated to have conspired by sending the letter of retraction and by giving a false statement retracting the earlier statements which are not the case qua with the appellants and the allegation against the third appellant that he along with the appellants 1 and 2 conspired to cause false entries in the account books and wilfully made false statement before the Income Tax Officer. On these facts, it was held that putting the 3rd appellant in joint trial with appellants 1 and 2 for conspiracy without any specific allegation or acceptable evidence to connect the 3rd appellant with the activities of appellants 1 and 2 amounted to misjoinder of charges which includes misjoinder of parties. Of course, in this case with regard to the first part of the scheme, A.1, A.2 and A.4 were said to have been involved while in the second part of the scheme A.1, A.2,A.3,A.5 and A.6 were said to have involved. All the appellants belong to a single Unit viz., TWAD Board. Evidence has been let in with regard to the part played by each and every accused separately. A.1 and A.2 are the common accused in both the parts of the scheme. P.W.28 in his report Ex.P.63 has categorically mentioned both the parts of the scheme separately and calculated the loss to the Government separately. Therefore, it cannot be said that any prejudice has been caused by joint trial of these accused. Moreover, such an objection was not taken before the trial Court. The Supreme Court in AIR 1963 SC 1850 in the State of Andhra Pradesh vs cheemalapati Ganeswara Rao has held that even if it is assumed that there has been a misjoinder of charges in violation of the provisions of Ss.233 to 339 of the Cr.P.C., the High Court was incompetent to set aside the conviction of the respondents without coming to the definite conclusion that misjoinder had occasioned a failure of justice. In this case also, the learned senior counsel could not say as to how failure of justice had occasioned. The Supreme Court in A.I.R. 1989 SC 937 in the case of Prem Chand vs State of Haryana has held that though there is misjoinder of charges on account of a joint trial of two appellants with one Ravi Shankar, no objection to the joint trial has been raised by these two appellants either at the trial stage or at the appellate stage or even before this Court, nor the appellants had shown any prejudice having been caused to them by such a trial. Having held so, they have further held that however, as contemplated under Sec.464 Cr.P.C in the absence of proof that failure of justice has occasioned by the joint trial, the finding and the sentence recorded by the competent Court cannot be said to be invalid. Therefore, the contention of the learned senior counsel has to be only rejected.

24. Turning to the facts of the case, the star witness is P.W.28. He was asked to ascertain the classification of the soil and the extent of sand bedding. He has submitted a detailed report Ex.P.63 showing the loss to the Government. The total loss to the Government seems to be Rs.54,733.91. The pipe line was laid for a distance of 5 ½ kms. The learned senior counsel questions the report submitted by P. W.28 on the ground that no reasons were given to arrive at the loss on each head and insofar as sand bedding is concerned, no length or height has been given. He further submits that P.W.28 is not expected to examine earth work, but he has also examined the earth work and ascertained certain loss. Insofar as earth work is concerned, the loss appears to be Rs.3,491.79 + Rs.2910.93 + Rs.13,355.35. While calculating the extent of sand bedding, he has also gone into the defect in the earth work. Even if the loss with regard to the earth work is deducted, there was a loss of nearly Rs.35,000/-. With regard to the classification of soil and sand bedding, the learned senior counsel submits that P.W.29 did not approve the findings of P.W.28 and lab test was also not conducted. He also questions the expertise of P.W.28. P.W.28 was an Executive Engineer in Public Works Department. He has put 52 pits with the help of P.W.29 for measurement. Merely because he has admitted that P.W.29 has not signed in the report given by him, it cannot be said that the measurements are wrong. It is not the evidence of P.W.29 that he disputed the measurements made by P.W.28. Though P.w.29 has admitted in his cross examination that some of the accused objected to the method of measurement and said that one side of the pit cannot be multiplied into two, still he has admitted that P.W.28 properly measured. It is the further contention of the learned senior counsel that P.W.28 himself has admitted in his report that no over payment was made on the work as a whole and therefore, there cannot be said to be actually any loss to the Government. May be that final payment has not been made, but the accused having been parties to estimate of the work and execution of the same, they are responsible for the loss. The learned Sessions Judge found besides the malpractice in the classification of soil, air pit was included for payment of bills which was not originally covered under the agreement.

25. The learned trial Judge held that conspiracy angle of the case has been proved on the ground that except two tenderers viz., P.W.15 and P.W.16, there were no other tenderers and P.W.15 is the cobrother of P.W.16. There appears to be an admission by P.W.16 that his tender was also filled up by P.W.15, his co-brother. As rightly held by the learned trial Jduge, direct evidence to establish the criminal conspiracy is seldom available and it has to be gathered from the facts and circumstances of each case. In this case, the measurement of the work in Bharathiar University was done by the 4th accused and the same was check measured by the 2nd accused. In respect of Maruthamalai Temple Adivaram work, the measurement was recorded by A.5 and A.6 and check measured by A.2 and A.3. The consequential loss caused to the government is indicative of conspiracy hatched by the accused. Insofar as the laying of the pipe is concerned, the contractors have to excavate the soil to make trenches. Thereafter, after laying the pipe line, new soil has to be put over the pipes. Payments will be made for the changed soil. Sand bed has to be provided for a particular extent. Inspite of providing sand bed according to the measurement, if sand bed is provided for lesser extent, malpractice is proved. P.W.28 is not inimical towards any of the accu sed. Therefore, there

is nothing to doubt his evidence or report.

26. According to Ex.P.15 agreement awarded in favour of P.W.14 for laying pipes to a distance of 3190 mts, he had laid pipes for 2933 mts. Even while the main agreement was in force, some of the works covered by the main agreement were taken up under the written understandings as indicated in Exs.P.23,24 and 25. Once the main agreement is in force, no second contract can be entered into with the same contractor. Written understanding is also a work order. Written understandings can be resorted to only when that portion of the work is not covered by the agreement, but it is not so in this case. P.Ws.11 and 12, who are the technical Assistants serving in the TWAD Board have stated that the written understandings were prepared on the direction of the 2nd accused. The amount was also sanctioned only by the 2nd accused on the recommendations made by the 4th accused insofar as execution of work done pursuant to the written understanding. Therefore, it is clear that A.2 and A.4 in connivance with P.Ws.15 and 16 have acted with a common design. P.Ws.17, 18 and 21 to 24 who were job workers employed by P.W.14 stated that they have not entered into any written understandings of their own. When they are only coolies working under P.W.14 and written understandings were proved to be make believe, the fault lies only on A.2 and A.4.

27. Insofar as Maruthamalai Temple Adivaram work is concerned, measurement were recorded by A.4 and A.5, and check measured by A.3 and A.6. P.W.3 a Junior Assistant, P.W.7 – the Accounts Officer, P.W.8 – a Superintendent deposed that A.4 made necessary entries for recording the measurement of the work on various dates and A.2 check measured the same. P.W.9 spoke to the fact that A.5 recorded the measurements as per the entries in Ex.P.22 Measurement Book on various dates and A.3 also recorded measurements on various dates. P.W.10 also deposed about recording of measurement by A.5. He speaks that A.2 made necessary entries for check measuring the same. A.6 also, according to P. W.10 recorded the measurement in Ex.P.10 – Measurement Book on various dates and A.3 check measured the same.

28. The learned Sessions Judge found that the evidence of P.W.7 discloses that A.6 was hand in glove with the contractors since he had prepared a letter No.236/85 dated 6.4.85 part of Ex.P.41 that extras and omissions can be met out within the main agreement itself. The entries made in Ex.P.41 also strengthens the evidence of P.W.7. Though the slabs to be fixed must have the thickness of 18 cms, actually they were of 15 cms alone as per the measurement, whereas the measurement book shows that they were 18 cms. It shows that A.6 had deliberately made false entries in the measurement book regarding the thickness of the R.C.C cover slab and it was A.3 who check measured the same. The learned Sessions Judge has given various details with regard to the parts played by the appellants 2 to 6. The actual total amount of contract to P.W.14 is Rs.90,135.20, while for P.W.15 Rs.84,993/-; but out of this amount, the loss caused to the TWAD Board appears to be more than Rs.50,000/-. That only shows that substandard work was done by the contractors in connivance with the appellants 2 to 6. Though the 1st appellant has to be acquitted on technical grounds, there is nothing to interfere with the conviction of the appellants 2 to 6. The learned Sessions

Judge also had discussed the evidence in detail to hold the appellants guilty and I see no reason to interfere with her findings except insofar the 1st appellant is concerned, who is entitled to an acquittal on technical grounds.

29. In the result, the appeal in C.A.248/96 filed by the 1st accused is allowed and he is acquitted and the conviction and the sentence in respect of him stand set aside. The fine amount, if any, paid by the 1st accused shall be refunded to him. Since he is acquitted on technical grounds, he is not entitled to any emoluments for the period during which he has not worked on the principle of "No Work No Pay". Insofar as the accused 2 to 6 are concerned, the appeals in C.A.No.249 /96 and 255/96 stand dismissed and their conviction including the sentence stand confirmed.
1.11.2002

sr
Index:yes
Web site: yes

On the oral representation of Mr.R. Shanmugasundaram, Senior Advocate, Leave granted to A2 to A6 under Article 134-A of the Constitution of India to appeal against this judgment in the Supreme Court of India.

1.11.2002
kv
To
1. The Additional Special Judge/I Addl.Sessions Judge-cum-Chief Judicial Magistrate, Coimbatore
2. The Principal Sessions Judge, Coimbatore
3. The Public Prosecutor, High Court, Chennai
4. the Inspector of Police, Vigilance and Anti-Corruption, Coimbatore

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